Supreme Court, U.S.

(1)

No. 94 583 SEP 26 1994

OFFICE OF THE CLERK

In The

Supreme Court Of The United States

October Term, 1993

JOHN YURCH,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

By: RICHARD M. MARANO
*LOUIS S. AVITABILE
182 Grand Street
Suite 314
Waterbury, CT 06702
(203) 755-2274

Attorneys for the Petitioner
John Yurch

*Counsel of Record

50 pp

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

DID THE FAILURE OF THE CONNECTICUT SUPREME COURT TO ADDRESS THE ISSUE OF WHETHER THE CRIMINAL STATUTE C.G.S. SEC. 20-427 UNDER WHICH THE PETITIONER WAS PROSECUTED CONTAINED A STATUTORY EXCEPTION EXCULPATING THE PETITIONER VIOLATE THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE CLEAR RESULT IS THE DECISION OF A FEDERAL QUESTION IN CONFLICT WITH THE OPINION OF THE UNITED STATES SUPREME COURT.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISION.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE PETITION.....6

CONCLUSION.....18

TABLE OF AUTHORITIES

TABLE OF CASES

Pages

Brazo v. Real Estate Commission, 177 Conn. 515 (1979) 13

Cunningham v. Cunningham, 72 Conn. 157 (1899) 5,8

Douglas v. California, 372 U.S. 353 (1963) 17

Dukes v. Durante, 192 Conn. 207 (1984) 10

Evitts v. Lucey, 469 U.S. 387 (1985) 17

Fourth National Bank v. Francklyn, 120 U.S. 747 (1886) 8

Ross v. Moffitt, 417 U.S. 600 (1974) 17

State v. Barnes, 19 Conn. 397 (1849) 5,7

State v. Cataudella, 159 Conn. 544 (1970) 13

State v. Evans, 165 Conn. 61 (1973) ... 16

State v. Golding, 213 Conn. 233 (1989) 17

State v. Kozlowski, 199 Conn. 667 (1986) 10

State v. Messler, 19 Conn. 432 (1989) 16

State v. Meyer, 1 Conn. 502 (1815)...5,7

State v. Nussenholtz, 76 Conn. 92 (1903).....5

State v. Poirer, 19 Conn. 1 (1989).....7

State v. Roque, 190 Conn. 143 (1983)..13

State v. Shaw, 24 Conn. App. 493 (1991).....8

State v. Torrence, 196 Conn. 430 (1985).....5,8

Taylor v. Illinois, 484 U.S. 400 (1988).....9

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 229 Conn. 516. App. A, infra.

JURISDICTION

The judgment and opinion of the Supreme Court of the State of Connecticut was released on May 31, 1994. On July 7, 1994, defendant's timely motions for reconsideration and reargument en banc were denied by the Supreme Court of the State of Connecticut. App. B., infra. The jurisdiction of this court is invoked under Title 28, U.S.C. Sec. 1257(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Amendment XIV of the United States Constitution provides in relevant part:

..."nor shall any State deprive any person of life, liberty, or property, without due process of law;"...

The Connecticut statute under which the defendant was prosecuted is C.G.S. Sec. 20-427, App. C, infra.

STATEMENT OF THE CASE

The defendant was convicted after a jury trial of four counts in reference to violation of the home improvement contractor's registration act under Conn. Gen. Stats. Sec. 20-427. The trial court twice indicated that it would charge in the words of Conn. Gen. Stats. Sec. 54-84(b) on the defendant's failure to testify. However, instead, the court in its charge used the word "unreasonable" instead of "unfavorable." The Appellate Court found this error to be plain error requiring reversal. The Supreme Court then granted the state's petition for certification. The Supreme Court reversed the Appellate Court's decision on May 31, 1994 and reinstated the conviction and sentence of the appellee.

Prior to oral argument before the Appellate Court in April 1993 the defendant obtained new counsel. New counsel, in reviewing the record and

preparing for oral arguments spotted, an issue that was not raised before the trial court by either the defendant, the state, or the court itself. That issue was whether the criminal statute (Section 20-427(b)(5)) under which the defendant was prosecuted contained a statutory exception or exemption under Section 20-427(f) and (g) which exculpated the defendant and made the actions of which he was accused under the circumstances of this case non-criminal.

New counsel attempted to raise this issue before the Appellate Court by motion for permission to file supplemental brief with supplemental brief attached, but said motion was denied by the Appellate Court. App. D, infra. The Appellate Court, thereafter, on the original brief in the appeal granted the defendant a new trial on the issue of the trial court's charge on the defendant's right to a no unfavorable inference charge on his

failure to testify under Conn. Gen. Stats. Sec. 54-84(b).

Thereafter, the Connecticut Supreme Court granted the state's petition for certification to review the Appellate Court's decision that the trial court's error in the charge as to no "unreasonable inference" was not harmless error. The defendant-appellee in his brief before the Connecticut Supreme Court on certification specifically raised and discussed the issue whether the criminal statute (Section 20-427(b)(5) under which the defendant was prosecuted contained a statutory exception or exemption under Section 20-427(f) and (g) which exculpated the defendant and made the actions of which he was accused under the circumstances of this case non-criminal. App. E, infra. The state in its reply brief specifically addressed this same issue raised by the defendant-appellee.

The Connecticut Supreme Court in its decision of May 31, 1994 in reversing the Appellate Court and reinstating judgments as in the trial court failed to address the issue as to whether or not a proper reading of the entire statutory scheme under Section 20-427 including (f) and (g) exculpated the defendant. The defendant-appellee's motions for reconsideration and reargument en banc stressed to the Connecticut Supreme Court its duty to act in the interests of justice and address plain error in the record brought to their attention as was done in the defendant-appellee's brief. App. E, infra. (See State v. Torrence, 196 Conn. 430, 433-434 fn. 5 (1985); State v. Meyer, 1 Conn. 502, 504-507 (1815); State v. Barnes, 19 Conn. 397, 404 (1849); State v. Nussenholtz, 76 Conn. 92, 96 (1903); Cunningham v. Cunningham, 72 Conn. 157, 160 (1899))

The Connecticut Supreme Court denied the motions for reargument and reconsideration

on July 7, 1994. On July 15, 1994 the defendant duly filed in the Connecticut Supreme Court a motion for stay of execution pending writ of certiorari to this Court.

REASONS FOR GRANTING THE PETITION

Section 20-427(b)(5) of the Connecticut Statutes does not make it unlawful for a contractor who has made application for renewal of his certificate of registration within a month or exactly one month after the expiration date to continue to offer to make or to make home improvements. There is no dispute that the defendant mailed an application for renewal of his home improvement contractor certificate of registration on May 29, 1990 which was received by the Office of Consumer Protection on June 1, 1990. (T3-25-92, pp. 9-19, 33-36) There is equally no dispute that on February 27, 1991 the Commissioner of Consumer Protection denied the defendant's application to renew his

registration, informing him on that date by mail that he no longer was "currently registered."

The quintessential dispute or issue that arose from the prosecution of the defendant should have been whether, considering the entire statutory scheme of General Statutes (Rev. to 1989) Section 20-427, the defendant's registration expired on May 1, 1990 or on February 27, 1991. It is the defendant's position that, having attempted to comply in good faith with the provisions of the statute, he comes within an exception to prosecution that is created by the correct and proper reading of the legislative intent created by the entire statute. See State v. Poirer, 19 Conn. App. 1, 2-4, 559 A.2d 1183 (1989); State v. Meyer, 1 Conn. 502, 504-507 (1815); State v. Barnes, 19 Conn. 397, 404 (1849).

Plain error and the interest of justice are implicated when a case is tried without a proper consideration of statutory exceptions to criminal prohibitions within a statute. See Cunningham v. Cunningham, 72 Conn. 157, 160, 44 A.41 (1899); State v. Shaw, 24 Conn. App. 493, 500, 589 A.2d 880 (1991); State v. Torrence, 196 Conn. 430, 433-434, fn. 5, 493 A.2d 865 (1985); Connecticut Practice Book Section 4185. The Connecticut Supreme Court failed to act in a situation where the statute as the law of the land had to be obeyed within its tenor and spirit. The Connecticut Supreme Court violated United States Supreme Court precedent that the courts are judicially bound to know the law and properly apply the statute that governs the case. See Fourth National Bank v. Francklyn, 120 U.S. 747, 751-752 (1886) cited within Cunningham v. Cunningham, 72 Conn. 157, 160, 44 A.41 (1899) and the defendant's

brief to the Connecticut Supreme Court. Therefore, the Connecticut Supreme Court was clearly aware of the due process effects on the liberty of the defendant caused by its failure to properly apply the statute as the law of the land and the law of the case. See Taylor v. Illinois, 484 U.S. 400, 406-407, fn. 9, (1988).

Neither the state nor defense counsel nor the trial court nor the Connecticut Supreme Court considered the entire statutory scheme under Section 20-427. Section 20-427(b)(5) makes it unlawful for a contractor to "offer to make or make any home improvement without having a current certificate of registration under this chapter." (emphasis added) Section 20-427(d) provides a system whereby a contractor whose last name begins with "Y" would have his registration expire annually on the first day of the month of May.

However, Section 20-427 does not contain any language notifying a contractor that his certificate of registration must be renewed on or before the expiration date (May 1, 1990 in this case) to be considered current. On the contrary, Sections 20-427(f) and (g), by the doctrine of inclusio unius est exclusio alterius, create a month grace period beyond the original expiration date allowing a contractor to make his application for renewal within that extended period beyond the expiration date. App. C, infra.

Considering the statute as a whole, reconciling its separate parts so that a reasonable overall interpretation is achieved, three distinct temporal categories delineating the rights and duties of contractors during the renewal process are created. See Dukes v. Durante, 192 Conn. 207, 214, 471 A.2d 1368 (1984); State v. Kozlowski, 199 Conn. 667,

678, 509 A.2d 20 (1986). Under Section 20-427(g) there is a temporal category concerning a contractor who waits more than one year after the expiration dated (here May 1, 1990) to attempt to renew or to renew his registration. Section 20-427(g) makes it plain and clear that the old registration will not in any way, shape or form be renewed and restored under those circumstances. Clearly under those circumstances a contractor would be in violation of Section 20-427(b)(5) because he does not have a "current registration."

Under a combined reading of Sections 20-427(f) and (g), there is a <u>second</u> temporal category concerning a contractor who waits more than one month but less than one year before he gets his registration restored and renewed. Public Acts 1988, No. 88-269, which amended Section 20-427(b)(5) by replacing the phase "first obtained" with the word

"current" also amended Section 20-427(f) by adding a second clarifying sentence providing that a contractor who made his application more than one month after his renewal expired could not have his registration renewed and restored until the application for renewal was actually approved by the commissioner. Therefore, Section 20-427(f) makes it plain and clear that a contractor who waits more than a month to make his application for renewal of his registration will not have a current registration unless and until the renewal is approved by the commissioner. Thus, a contractor within this second temporal category would be in violation of Section 20-427(b)(5) until such time as his application for renewal is actually approved by the commissioner and his registration is thus made "current."

The words of Section 20-427(f) by implication and exclusion create a third temporal category concerning a contractor

who makes his application for renewal either within a month after expiration or on the first day of the next month after the date of expiration itself. (For example if the date of expiration under Section 20-427(d) is May 1, 1990, then the third temporal category applies to those contractors who make their application on or before June 1, 1990.) The actions of the defendant in the present case fall within this third temporal category.

Because Section 20-427 has penal provisions, it must be strictly construed. Brazo v. Real Estate Commission, 177 Conn. 515, 526, 418 A.2d 883 (1979) No court can extend a statute "by implication to create liability which no language of the act purports to create." State v. Roque, 190 Conn. 143, 151, 460 A.2d 26 (1983), State v. Cataudella, 159 Conn. 544, 555-556, 271 A.2d 99 (1970)

In the present case of Yurch, the inclusion of all contractors who make their renewal application after one month from the expiration date as not having a current registration until their renewal application is approved by the commissioner creates the exclusion of all contractors who make their renewal application within one month or less after the expiration date from the requirement of not having a current registration until the renewal is approved by the commissioner. It is a common sense interpretation of the statute that all contractors (such as the defendant) who come within the grace period can consider their registration will be renewed and made current until such time as they are notified that their application is denied and they are told by the commissioner that they are no longer "currently registered" as was done in this case by the commissioner's letter of February 27,

1991.

Since the actions for which the defendant was prosecuted on the First and Third Counts took place between June 1990 and February 27, 1991 (See State's Brief pp. 4-5), those actions were not unlawful and were committed at a point in time when the defendant was currently registered with the commissioner of consumer protection. Acquittals should be entered on those counts.

In reference to the Second and Fourth Counts, the defendant entered into each contract to make home improvements before February 27, 1991, namely on October 1, 1990 and October 10, 1990 respectively. (See State's Brief p. 5) The work, however, as to each count was completed after February 27, 1991, namely June 1991 and August 1991 respectively. (See State's Brief p. 5) As to the second and fourth counts, the defendant clearly had a defense of good faith and necessity in

that he was bound under the law and the contract to finish the work he had lawfully contracted to do before February 27, 1991. See State v. Messler, 19 Conn. App. 432, 435-439, 562 A.2d 1138 (1989) (lesser of two evils defense). The trial court's erroneous "unreasonable" inference charge may very well have contributed to the defendant's conviction on those counts. A new trial is required on the second and fourth counts.

It is the defendant's position that in not addressing the statutory exception issue raised in the defendant-appellee's brief and responded to in the state-appellant's brief, the Connecticut Supreme Court denied the defendant his federal due process right to direct review of a claim where the record adequately supports the fact that the defendant has clearly been deprived of a fundamental constitutional right and a fair trial. See State v. Evans, 165 Conn. 61, 70 (1973); State v.

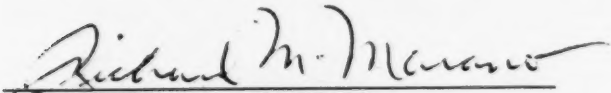
Golding, 213 Conn. 233, 238-243 (1989). The Connecticut Supreme Court's failure to address the issue of innocence of the defendant by reason of statutory exception or exemption denied the defendant proper federal due process in his first appeal as of right to determine whether he, John Yurch, had been lawfully convicted and to have a fair and reasoned decision and disposition as to his claims in the context of the State of Connecticut's appellate process. See Ross v. Moffitt, 417 U.S. 600, 611-616, 41 L.Ed. 2d 341, 94 S.Ct. 2437 (1994); Douglas v. California, 372 U.S. 353, 9 L.Ed. 2d 811, 83 S.Ct. 814 (1963); Evitts v. Lucey, 469 U.S. 387, 400-405, 83 L.Ed. 2d 821, 105 S.Ct. 830 (1985).

CONCLUSION

For all of the foregoing reasons, the petitioner's writ of certiorari should properly be ordered granted.

Respectfully Submitted,

THE PETITIONER, JOHN YURCH



RICHARD M. MARANO
LOUIS S. AVITABILE,
His Attorneys
182 Grand St., Suite 314
Waterbury, CT 06702
Tel. (203) 755-2274

Dated: September 10, 1994

No. _____

In The

Supreme Court Of The United States

October Term, 1993

JOHN YURCH,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

APPENDIX: TABLE OF CONTENTS

Pages

OPINION BELOW.....1a-10a

ORDER OF THE SUPREME COURT OF THE STATE OF CONNECTICUT REGARDING PETITIONER'S MOTION FOR RECONSIDERATION.....1b

ORDER OF THE SUPREME COURT OF THE STATE OF CONNECTICUT REGARDING MOTION FOR RE-ARGUMENT EN BANC.....1c-2c

ORDER OF APPELLATE COURT DENYING MOTION FOR PERMISSION TO FILE A SUPPLEMENTAL BRIEF.....1d

DEFENDANT-APPELLEE'S BRIEF BEFORE THE CONNECTICUT SUPREME COURT pages 8-15.....1e-10e

Appellate Court, we agree with that court that the defendant was not entitled to a jury instruction on the defense of alteration/modification by misuse under § 52-572p. The trial judge did instruct on misuse under the common law and the defendant does not raise any claim of error in this respect.

In regard to the second certified question, we conclude, and the defendant conceded at oral argument, that comparative responsibility under § 52-572o is applicable to the common law misuse defense. The defendant's claim that comparative responsibility is not applicable to misuse has reference solely to § 52-572p.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOHN YURCH
(14831)

PETERS, C. J., BORDEN, BERDON, NORCOTT and KATZ, Js.

Convicted of the crimes of making home improvements and offering to make home improvements without having a current certificate of registration, in violation of the applicable statute (§ 20-427 [b]), the defendant appealed to the Appellate Court. The Appellate Court reversed the judgment of the trial court, and the state, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly determined that the trial court committed reversible error in instructing the jury to draw no "unreasonable" inference from the defendant's failure to testify; the trial court's departure from the statutory (§ 54-84 [b]) language of no "unfavorable" inference, although improper, was rendered harmless by the remainder of the instruction.

Argued February 18—decision released May 31, 1994

Substitute information charging the defendant with three counts of the crime of making home improvements without a certificate of registration from the commissioner of consumer protection and with one count of the crime of offering to make home improvements without that certificate of registration, brought

to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Lager, J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Dupont, C. J., Freedman* and *Schaller, Js.*, which reversed the trial court's judgment and remanded the case for a new trial, and the state, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Stephen R. Park, special assistant state's attorney, with whom, on the brief, were *John M. Bailey,* chief state's attorney, and *Richard Blumenthal,* attorney general, for the appellant (state).

Louis S. Avitabile, with whom, on the brief, was *Meryl Anne Spat,* for the appellee (defendant).

NORCOTT, J. The issues raised in this certified appeal are (1) whether our decision in *State* v. *Tatem,* 194 Conn. 594, 483 A.2d 1087 (1984), requires automatic reversal and a new trial when a trial court uses the word "unreasonable" in place of "unfavorable" in a jury instruction issued pursuant to General Statutes § 54-84 (b),[1] and (2) if not, whether the use of the word "unreasonable" in the present case was harmless beyond a reasonable doubt in the context of the jury charge as a whole.

[1] General Statutes § 54-84 provides: "TESTIMONY OR SILENCE OF ACCUSED. (a) Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. The neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official, except as provided in subsection (b) of this section.

"(b) Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. In cases tried to the court, no unfavorable inferences shall be drawn by the court from the accused's silence."

After a jury trial, the defendant, John Yurch, was convicted of one count of offering to make home improvements without a current certificate of registration and three counts of making home improvements without that certificate of registration in violation of General Statutes § 20-427 (b) (5).[2] At trial, the state presented evidence from which the jury could reasonably have found the following facts. On June 11, 1990, the defendant entered into a written agreement with Salvatore and Janice Arena to build a three room addition to their Monroe residence in return for $28,000. On July 31, 1990, the defendant entered into a written agreement with Thomas Story. That agreement provided that the defendant would make home improvements to Story's Woodbury residence in return for $4350. During the period between December, 1990, and

[2] General Statutes § 20-427 (b) provides: "No person shall: (1) Present or attempt to present, as his own, the certificate of another, (2) knowingly give false evidence of a material nature to the commissioner for the purpose of procuring a certificate, (3) represent himself falsely as, or impersonate, a registered home improvement contractor or salesman, (4) use or attempt to use a certificate which has expired or which has been suspended or revoked, (5) offer to make or make any home improvement without having a current certificate of registration under this chapter, (6) represent in any manner that his registration constitutes an endorsement of the quality of his workmanship or of his competency by the commissioner, (7) employ or allow any person to act as a salesman on his behalf unless such person is registered as a home improvement salesman, or (8) fail to refund the amount paid for a home improvement within ten days of a written request mailed or delivered to the contractor's last known address, if no substantial portion of the contracted work has been performed at the time of the request and more than thirty days has elapsed since the starting date specified in the written contract. In addition to any other remedy provided for in this chapter, any person who violates any provision of this subsection shall be fined not more than five hundred dollars or imprisoned for not more than one year or be both fined and imprisoned. Notwithstanding subsection (d) of section 53a-29, if the court determines that a contractor cannot fully repay his victims within the period of probation established in that subsection, the court may impose probation for a period of not more than five years. A violation of any of the provisions of this chapter shall be deemed an unfair or deceptive trade practice under subsection (a) of section 42-110b."

July, 1991, the defendant reshingled the roof, boxed in the chimney and installed soffit vents on Story's house. On October 5, 1990, the defendant entered into a written agreement with Vivian Chabot to remodel the kitchen in her Woodbury residence for the price of $10,500. The defendant performed a portion of the work between January and June, 1991, but did not completely remodel the kitchen. On October 10, 1990, the defendant entered into a written agreement with Fred Thorpe and his wife to build two closets, an office and a bathroom with a whirlpool bath at the Thorpes' Woodbury residence for a price of $27,400. The defendant made those home improvements between November, 1990, and August, 1991.

The state also offered the testimony of Olivia Martinchek, a consumer information representative in the complaint center of the frauds division of the Connecticut department of consumer protection. Martincheck testified that she was the supervisor of the home improvement unit of the frauds division from July, 1985, through December, 1991, and that she was familiar with the procedures by which home improvement contractors were issued certificates of registration. She further testified that she was familiar with the records regarding the defendant's registration as a home improvement contractor in the state of Connecticut. Martinchek testified that the defendant had been registered first on May 20, 1982, with yearly renewals through May 1, 1987, and again on April 1, 1989, through May 1, 1990, but that he had not held a valid certificate of registration at any time thereafter.

After the state had rested its case, the defendant neither presented evidence nor testified. Without presenting a theory of defense to the jury, he elected to rely on the prospect that the state had not carried its burden of proving beyond a reasonable doubt the elements of a violation of § 20-427 (b).

The jury returned a verdict of guilty of all counts. The trial court rendered a judgment of conviction and sentenced the defendant to a term of four years incarceration, suspended after two years, and two years probation with special conditions including payment of $55,419.79 in restitution to the homeowners.

The defendant appealed from the judgment of conviction to the Appellate Court. He claimed that the instruction given by the trial court[3] pursuant to § 54-84 (b) was improper because it allowed the jury to draw any inference, favorable or unfavorable, from the fact that the defendant did not tesify. Relying on *State* v. *Tatem,* supra, 194 Conn. 594, the Appellate Court concluded, in a per curiam opinion, "that the [trial court's] use of 'unreasonable' instead of 'unfavorable' changes the substantive meaning of the statute and is therefore plain error," which error entitled the defendant to a new trial. *State* v. *Yurch,* 31 Conn. App. 688, 690, 626 A.2d 1320 (1993). We granted the state's petition for certification.[4] *State* v. *Yurch,* 227 Conn. 910, 632 A.2d 699 (1993). We now reverse the judgment of the Appellate Court.

[3] The relevant portion of the trial court's jury charge reads as follows: "The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised, and no unreasonable inference may be drawn from the fact that a defendant decides not to testify. You must not permit such a fact to weigh in the slightest degree against the defendant. Nor should it enter your discussions or deliberations. A defendant is not required to establish his innocence. He need not produce any evidence whatsoever if he does not choose to do so. As I have told you already, the burden is on the state to prove a defendant guilty beyond a reasonable doubt. If it fails, a defendant has the right to rely on that failure, and must be of right acquitted."

[4] We granted certification limited to the following issues:

"1. Did the Appellate Court properly reverse the judgment of the trial court by holding that this court's decision in *State* v. *Tatem,* 194 Conn. 594 (1984), establishes that the trial court's use of the word 'unreasonable' in place of 'unfavorable' in instructing the jury under General Statutes § 54-84 (b) automatically requires reversal and a new trial?

"2. If the answer to question 1. is no, was the trial court's misstatement of the word 'unreasonable' in charging the jury under General Statutes

The state claims that the Appellate Court improperly interpreted *State* v. *Tatem*, supra, 194 Conn. 594, as mandating automatic reversal when the word "unreasonable" is used in place of "unfavorable" in a § 54-84 (b) jury instruction. The state argues instead that *State* v. *Tatem*, supra, and its progeny establish that such an improper jury instruction constitutes plain error that may be " 'harmless if, when viewed in the context of the jury charge as a whole, there is no reasonable possibility that the jury was misled. . . .' " Id., 599. We agree with the state.

As a preliminary matter, "we note that we have repeatedly held that a claim of trial court noncompliance with § 54-84 (b) is reviewable on appeal even though a defendant, as in this case, did not at trial except to the charge as given." *State* v. *Townsend*, 206 Conn. 621, 625, 539 A.2d 114 (1988); see Practice Book § 4185. As we have previously explained, "noncompliance with § 54-84 (b) is plain error because the statute serves to effectuate the fundamental right of a defendant not to testify in his criminal trial." *State* v. *Sinclair*, 197 Conn. 574, 582, 500 A.2d 539 (1985); see *State* v. *Tatem*, supra, 194 Conn. 595.[5] The defendant's claim therefore was properly before the Appellate Court.

§ 54-84 (b), when viewed in the context of the jury charge as a whole and the evidence in the case, harmless beyond a reasonable doubt?" *State* v. *Yurch*, 227 Conn. 910, 632 A.2d 699 (1993).

Because we conclude that, in the context of the entire jury charge, the trial court's improper use of the word "unreasonable" was harmless beyond a reasonable doubt, we do not reach the state's claim that such an error could be harmless in light of the overwhelming evidence tending to show the defendant's guilt.

[5] The defendant's right not to testify is rooted in the privilege against self-incrimination under both the federal and the state constitutions. " 'The fifth amendment to the United States constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." That provision acts as a restraint upon the individual states as well as the federal government under the fourteenth amendment to the United States constitution. *Malloy* v. *Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed.

Whenever a defendant does not testify at trial, § 54-84 (b) requires that, "[u]nless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. . . ." *State* v. *Cobb,* 199 Conn. 322, 324, 507 A.2d 457 (1986) ("it was error for the trial court not to give the charge in the statutory language"). In the present case, the trial court improperly departed from the statutory language. Instead, the trial court instructed the jury as follows: "The law does not compel a defendant to take the witness stand and testify, and no *unreasonable* inference may be raised, and no presumption of guilt may be drawn from the fact that a defendant decides not to testify." (Emphasis added.) The state does not challenge the conclusion of the Appellate Court that the charge did not comply with the requirements of the statute, but argues instead that in light of the entire jury charge the trial court's deviation was harmless.

In *State* v. *Tatem,* supra, 194 Conn. 599–600, we declined to give talismanic effect to the use of the word "unreasonable" in a § 54-84 (b) jury charge. Employing a harmless error analysis, we held that " '[a]n erroneous instruction, even of constitutional dimension, is harmless if, viewed in the context of the charge as a whole, there is no possibility that the jury was misled. *State* v. *Hines,* 187 Conn. 199, 209, 445 A.2d 314 (1982).' *State* v. *Carrione,* [188 Conn. 681, 685, 453 A.2d 1137 (1982), cert. denied, 460 U.S. 1084, 103 S. Ct. 1775, 76 L. Ed. 2d 347 (1983)]. . . . '[W]hether

2d 653 (1963). Article first, § 8, of the Connecticut constitution affords criminal defendants a similar protection in language at least as broad as its federal counterpart. That section, which sets forth the rights of accused persons in criminal prosecutions, provides that "[n]o person shall be compelled to give evidence against himself . . . ." *State* v. *Cohane,* 193 Conn. 474, 482, 479 A.2d 763, cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984)." *State* v. *Sinclair,* supra, 197 Conn. 583 n.10.

a charge is possibly misleading depends on the substance rather than the form of what is said.' *State* v. *Kurvin*, 186 Conn. 555, 565, 442 A.2d 1327 (1982)." *State* v. *Tatem*, supra. Furthermore, when a statutory violation implicates the defendant's constitutional right against self-incrimination; see footnote 5; it is the state's burden to prove harmlessness beyond a reasonable doubt. *State* v. *Sinclair*, supra, 197 Conn. 584.[6]

Because the Appellate Court failed to undertake a harmless error analysis in the present case, we now address the state's claim that the erroneous instruction was, in the context of the jury charge as a whole, harmless beyond a reasonable doubt. After applying the above principles to the jury charge as a whole, we conclude that the trial court's failure to follow the literal wording of § 54-84 (b) was harmless.

The defendant argues, on the basis of *State* v. *Tatem*, supra, 194 Conn. 594, that the trial court's improper instruction allowed the jury to draw any inference whatsoever from the defendant's failure to testify, resulting in prejudicial error. The state argues to the contrary that the trial court's misstatement was rendered harmless by the language that immediately followed in the jury charge. Referring to the defendant's failure to testify, the trial court stated immediately

[6] Our application of a harmless error analysis is consistent with the basic tenets and goals of our adversarial system of criminal justice. "Indeed, the appellate harmless error doctrine is rooted in [a] fundamental purpose of our criminal justice system—to convict the guilty and acquit the innocent. ' "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States* v. *Nobles*, 422 U.S. 225, 230 [95 S. Ct. 2160, 45 L. Ed. 2d 141] (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." ' *Rose* v. *Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)." *Bunkley* v. *Commissioner of Correction*, 222 Conn. 444, 460, 610 A.2d 598 (1992).

after the erroneous language: "You must not permit such a fact to weigh in the slightest degree against the defendant. Nor should it enter your discussions or deliberations. A defendant is not required to estabish his innocence. He need not produce any evidence whatsoever if he does not choose to do so. As I have told you already, the burden is on the state to prove a defendant guilty beyond a reasonable doubt. If it fails, a defendant has the right to rely on that failure, and must be of right acquitted." The defendant concedes that this language standing alone was in substance a proper statement of the principles underlying § 54-84 (b). Nonetheless, he argues that once the erroneous language was uttered by the court, the deviation could be cured only by a specific repudiation. We disagree.

On the basis of the foregoing language, we are persuaded that it was not reasonably possible that the jury would have understood the court to be permitting any inferences whatsoever to be drawn. The language following the improper charge served to alert the jury to the fact that it was to draw no inference whatsoever from the defendant's failure to testify. It is axiomatic that "[a]n instruction prohibiting any inference would also preclude an unfavorable inference." *State* v. *Marra,* 195 Conn. 421, 443, 489 A.2d 350 (1985). As a result, despite the trial court's deviation from the statutory language, "the substantive meaning of the statutory requirement was conveyed." Id. We conclude therefore that although the trial court improperly instructed the jury that it could not draw unreasonable inferences from the fact that the defendant did not testify, that misstatement was rendered harmless by the language that immediately followed, completely prohibiting the use of that fact.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion the other justices concurred.

MICHAEL LUTYNSKI *v.* B.B. & J. TRUCKING, INC.
(14822)

CALLAHAN, BORDEN, BERDON, NORCOTT and PALMER, Js.

Argued March 25—decision released May 31, 1994

Action to recover damages for personal injuries sustained in a motor vehicle accident allegedly caused by the defendant's negligence, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Murray, J.;* verdict and judgment for the plaintiff; thereafter, the court denied the plaintiff's motion for interest and attorney's fees and the defendant's motion for a reduction of the damages award by the amount of benefits received from collateral sources, and the plaintiff appealed and the defendant cross appealed to the Appellate Court, *Dupont, C. J., Landau* and *Heiman, Js.,* which reversed in part the trial court's judgment as to the plaintiff's appeal and remanded the case with direction to award prejudgment interest to the plaintiff, and affirmed the judgment as to the defendant's cross appeal, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

James E. Kernan, for the appellant (defendant).

James A. Mulhall, Jr., with whom was *Kevin T. Nixon, Sr.,* for the appellee (plaintiff).

Barbara L. Cox, William F. Gallagher and *Kurt Koehler,* law student intern, filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

APPENDIX "B"

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 14831

STATE OF CONNECTICUT

v.

JOHN YURCH : JULY 7, 1994

O R D E R

THE MOTION OF THE DEFENDANT-APPELLEE, FILED JUNE 20, 1994, FOR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D **DENIED.**

BY THE COURT

Michele T. Angers/s/
MICHELE T. ANGERS
DEPUTY CHIEF CLERK

NOTICE SENT: 7/7/94
LOUIS S. AVITABILE
STEPHEN R. PARK, A.A.G
CLERK, FAIRFILED AT G.A.2
(CR91-0064235S)
HON. LINDA LAGER
REPORTER OF JUDICIAL DECISIONS

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 14831

STATE OF CONNECTICUT

v.

JOHN YURCH : JULY 7, 1994

O R D E R

THE MOTION OF THE DEFENDANT-APPELLEE, FILED JUNE 20, 1994, FOR REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D **DENIED.**

BY THE COURT

Michele T. Angers/s/
MICHELE T. ANGERS
DEPUTY CHIEF CLERK

NOTICE SENT: 7/7/94
LOUIS S. AVITABILE
STEPHEN R. PARK, A.A.G
CLERK, FAIRFILED AT G.A.2
(CR91-0064235S)
HON. LINDA LAGER
REPORTER OF JUDICIAL DECISIONS

APPENDIX "C"

SEC. 20-427. **Holder to exhibit and advertise certificate, when. Prohibited acts. Penalties. Certificates not transferable. Expiration. Renewal. Restoration. Building permits.**

...(b) No person shall: (2) knowingly give false evidence of a material nature...(5) offer to make or make any home impovement without having a current certificate of registration under this chapter,...In addition to any other remedy provided for in this chapter, any person who violates any provision of this subsection shall be fined not more than five hundred dollars or imprisoned for not more than one year or be both fined and imprisoned. A violation of any of the provisions of this chapter shall be deemed an unfair or deceptive trade practice under subsection (a) of section 42-110b...

(d) All certificates issued under the pro-visions of this chapter shall expire annually on the first day of the month corresponding to the individual applicant's last name or, if the applicant is a partnership or corporation, corresponding to the first name of such applicant, excluding the words "a", "an" or "the", in the following schedule:

Month	First Letter of Name
January	M
February	S
March	L
April	Q R
May	U,V,W,X,Y,Z
June	A,D

July	B
August	C,E
September	F,G
October	H,N
November	I,T
December	J,K,O,P

The fee for renewal of a certificate shall be the same as the fee charged for an original application.

...(f) A contractor or salesman whose certificate has expired more than one month before his application for renewal is made shall have his registration restored upon payment of a fee of twenty dollars in addition to his renewal fee. Restoration of a registration shall be effective upon approval of the application for renewal by the commissioner.

(g) A certificate shall not be restored unless it is renewed not later than one year after its expiration.

(h) Failure to receive a notice of expiration or a renewal application shall not exempt a contractor or salesman from the obligation to renew.

APPENDIX "D"

APPELLATE COURT

STATE OF CONNECTICUT

AC 11282

STATE OF CONNECTICUT

v.

JOHN YURCH : April 28, 1993

ORDER

THE MOTION OF THE DEFENDANT, FILED APRIL 22, 1993, FOR PERMISSION TO FILE A SUPPLEMENTAL BRIEF, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.

BY THE COURT,

Cynthia M. Gworerk /s/
CYNTHIA M. GWOREK
ASSISTANTCLERK-APPELLATE

Notice sent: April 28, 1993
Stephen R. Park, Assistant
Attorney General
Louis Avitable

APPENDIX "E"

III. THE EVIDENCE AGAINST THE DEFENDANT, WHEN CONSIDERED UNDER A
A PROPER INTERPRETATION OF PRECISELY WHAT SECTION 20-427 OF THE GENERAL STATUTES PROHIBITS, WAS NOT SO DIRECT AND OVERWHELMING THAT THE JURY'S VERDICT COULD NOT HAVE BEEN INFLUENCED BY THE TRIAL COURT'S MIS-STATEMENT WHEN CHARGING UNDER SECTION 54-84(b).

The state argues both in its statement of facts (State's Brief pp. 5-6) and its argument (State's Brief pp. 27-32) that the evidence was uncontested that the defendant did not have a certificate of registration at any time after May 1, 1990. The state's argument is based on an incorrect interpretation of Connecticut General Statutes Section 20-427(b)(5) that does not take into consideration the entire statutory scheme under Section 20-427. (See App. 1A-3A)

Section 20-427(b)(5) does not make it unlawful for a contractor who has made his application for renewal of his certificate of registration within a month or exactly one month after the expiration date to

continue to offer to make or to make home improvements. There is no dispute that the defendant mailed an application for renewal of his home improvement contractor certificate of registration on May 29, 1990 which was received by the Office of Consumer Protection on June 1, 1990. (T3-25-92, pp. 9-19, 33-36) There is equally no dispute that on February 27, 1991 the Commissioner of Consumer Protection denied the defendant's application to renew his registration, informing him on that date by mail that he no longer was "currently registered."

The quintessential dispute or issue that arises from the prosecution of the defendant is whether, considering the entire statutory scheme of General Statutes (Rev. to 1989) Section 20-427, the defendant's registration expired on May 1, 1990 or on February 27, 1991. It is now the defendant's position that, having attempted to comply in good faith

with the provisions of the statute, he comes within an exception to prosecution that is created by the correct and proper reading of the legislative intent created by the entire statute. See State v. Poirer, 19 Conn. App. 1, 2-4, 559 A.2d 1183 (1989); State v. Meyer, 1 Conn. 502, 504-507 (1815).

Plain error and the interest of justice are implicated when a case is tried without a proper consideration of statutory exceptions to criminal prohibitions within a statute. See Cunningham v. Cunningham, 72 Conn. 157, 160, 44 A.41 (1899); State v. Shaw, 24 Conn. App. 493, 500, 589 A.2d 880 (1991); State v. Torrence, 196 Conn. 430, 433-434, fn.5. 493 A.2d 865 (1985); Connecticut Practice Book Section 4185. Neither the state nor defense counsel nor the trial court considered the entire statutory scheme under Section 20-427. Section 20-427(b)(5) makes it unlawful for a

contractor to "offer to make or make any home improvement without having a current certificate of registration under this chapter." (emphasis added) Section 20-427(d) provides a system whereby a contractor whose last name begins with "Y" would have his registration expire annually on the first day of the month of May.

However, Section 20-427 does not contain any language notifying a contractor that his certificate of registration must be renewed on or before the expiration date (May 1, 1990 in this case) to be considered current. On the contrary, Sections 20-427(f) and (g), by the doctrine of inclusio unius est exclusio alterius, create a month grace period beyond the original expiration date allowing a contractor to make his application for renewal within that extended period beyond the expiration date. (See App. 1A-3A)

Considering the statute as a whole, reconciling its separate parts so that a reasonable overall interpretation is achieved, three distinct temporal categories delineating the rights and duties of contractors during the renewal process are created. See Dukes v. Durante, 192 Conn. 207, 214, 471 A.2d 1368 (1984); State v. Kozlowski, 199 Conn. 667, 678, 509 A.2d 20 (1986). Under Section 20-427(g) there is a temporal category concerning a contractor who waits more than one year after the expiration date (here May 1, 1990) to attempt to renew or to renew his registration. Section 20-427(g) makes it plain and clear that the old registration will not in any way, shape or form be renewed and restored under those circumstances. Clearly under those circumstances a contractor would be in violation of Section 20-427(b)(5) because he does not have a "current registration."

Under a combined reading of Sections 20-427(f) and (g), there is a second temporal category concerning a contractor who waits more than one month but less than one year before he gets his registration restored and renewed. Public Acts 1988, No. 88-269, which amended Section 20-427(b)(5) by replacing the phase "first obtained" with the word "current" also amended Section 20-427(f) by adding a second clarifying sentence providing that a contractor who made his application more than one month after his renewal expired could not have his registration renewed and restored until the application for renewal was actually approved by the commissioner. Therefore, Section 20-427(f) makes it plain and clear that a contractor who waits more than a month to make his application for renewal of his registration will not have a current registration unless and until the renewal is approved by the commissioner.

Thus, a contractor within this second temporal category would be in violation of Section 20-427(b)(5) until such time as his application for renewal is actually approved by the commissioner and his registration is thus made "current."

The words of Section 20-427(f) by implication and exclusion create a third temporal category concerning a contractor who makes his application for renewal either within a month after expiration or on the first day of the next month after the date of expiration itself. (For example if the date of expiration under Section 20-427(d) is May 1, 1990, then the third temporal category applies to those contractors who make their application on or before June 1, 1990.) The actions of the defendant in the present case fall within this third temporal category. Because Section 20-427 has penal provisions, it must be strictly construed. Brazo v. Real Estate

Commission, 177 Conn. 515, 526, 418 A.2d 883 (1979) No court can extend a statute "by implication to create liability which no language of the act purports to create." State v. Roque, 190 Conn. 143, 151, 460 A.2d 26 (1983), State v. Cataudella, 159 Conn. 544, 555-556, 271 A.2d 99 (1970)

In the present case of Yurch, the inclusion of all contractors who make their renewal application after one month from the expiration date as not having a current registration until their renewal application is approved by the commissioner creates the exclusion of all contractors who make their renewal application within one month or less after the expiration date from the requirement of not having a current registration until the renewal is approved by the commissioner. It is a common sense interpretation of the statute that all contractors (such as the defendant) who

come within the grace period can consider their registration will be renewed and made current until such time as they are notified that their application is denied and they are told by the commissioner that they are no longer "currently registered" as was done in this case by the commissioner's letter of February 27, 1991.

Since the actions for which the defendant was prosecuted on the First and Third Counts took place between June 1990 and February 27, 1991 (See State's Brief pp. 4-5), those actions were not unlawful and were committed at a point in time when the defendant was currently registered with the commissioner of consumer protection. Acquittals should be entered on those counts.

In reference to the Second and Fourth Counts, the defendant entered into each contract to make home improvements before February 27, 1991, namely on October 1,

1990 and October 10, 1990 respectively. (See State's Brief p. 5) The work, however, as to each count was completed after February 27, 1991, namely June 1991 and August 1991 respectively. (See State's Brief p. 5) As to the second and fourth counts, the defendant clearly had a defense of good faith and necessity in that he was bound under the law and the contract to finish the work he had lawfully contracted to do before February 27, 1991. See State v. Messler, 19 Conn. App. 432, 435-439, 562 A.2d 1138 (1989) (lesser of two evils defense). The trial court's erroneous "unreasonable" inference charge may very well have contributed to the defendant's conviction on those counts. A new trial is required on the second and fourth counts.

(2)

Supreme Court, U.S.
FILED
OCT 5 1994
OFFICE OF THE CLERK

No. 94-583

In The
Supreme Court Of The United States
October Term, 1994

JOHN YURCH,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Attorneys for Respondent:

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

*STEPHEN R. PARK
Assistant Attorney General
Special Assistant State's Attorney
Office of the Attorney General
110 Sherman Street
Hartford, CT 06105-2294
(203) 566-5374

**Counsel of Record for Respondent*

BEST AVAILABLE COPY

16 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment entitles a criminal defendant to appellate review in the state courts of a non-constitutional claim involving only issues of state law, which the defendant did not present or preserve for appellate review in the trial court, and which he did not present properly for appellate review.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED..... 6

I. THE PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW..... 6

II. IMPORTANT QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED..... 9

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases: **Page**

Bailey v. Anderson,
326 U.S. 206 (1945) 8

Exxon Corp. v. Eagerton,
462 U.S. 176 (1983) 8

Hill v. California,
401 U.S. 797 (1971) 7

Palmer Oil Corp. v. Amerada Corp.,
343 U.S. 390 (1952) 8

Radio Station WOW v. Johnson,
326 U.S. 120 (1945) 8

State v. Golding,
213 Conn. 233, 567 A.2d 823 (1989) 7

State v. Kulmac,
230 Conn. 43, 644 A.2d 887 (1994) 6

State v. Yurch,
31 Conn. App. 688, 626 A.2d 1320 (1993) 2

State v. Yurch,
227 Conn. 910, 632 A.2d 699 (1993) 2

Cases: **Page**

State v. Yurch,
229 Conn. 516, 641 A.2d 1387 (1994) 2,3

United States v. Johnston,
268 U.S. 220 (1925) 10

Zucht v. King,
260 U.S. 174 (1922) 8

STATUTES AND RULES (Connecticut)

Conn. Gen. Stat. § 20-427(b)(5) 2

Conn. Gen. Stat. § 20-427(f) 10

Conn. Gen. Stat. § 54-84(b) 2

Conn. Practice Book Section 4140 4

Conn. Practice Book Section 4185 4,7

No. 94-583

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN YURCH,

Petitioner,

v.

STATE OF CONNECTICUT

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

STATEMENT OF THE CASE

After a jury trial at which he did not testify, the petitioner was convicted of one misdemeanor count of offering to make home improvements without a current certificate of registration and three misdemeanor counts of making home improvements without a current certificate of registration in violation of Conn. Gen. Stat.

§ 20-427(b)(5).[1/] The trial court rendered a judgment of conviction.

The petitioner appealed from the judgment of conviction to the Connecticut Appellate Court. The sole issue raised by the petitioner on this appeal was his challenge to the trial court's "no adverse inference" instructions under Conn. Gen. Stat. § 54-84(b).[2/] See Appellant's Brief and Reply Brief. The Appellate Court found reversible error in the trial court's instructions, and ordered a new trial. State v. Yurch, 31 Conn. App. 688, 626 A.2d 1320 (1993). The Connecticut Supreme Court granted the respondent's petition for certification. The issues certified for review were limited to the petitioner's challenge to the trial court's "no adverse inference" instructions under the Connecticut statute. State v. Yurch, 227 Conn. 910, 632 A.2d 699 (1993). In a unanimous opinion, the Connecticut Supreme Court reversed the judgment of the Appellate Court and affirmed the judgment of the trial court. State v. Yurch, 229 Conn. 516, 641 A.2d 1387 (1994).

The petitioner filed Motions for Reconsideration and Reargument En Banc before the Connecticut Supreme Court based upon an entirely different claim than that upon which the appeal was decided. The

---

1/ See State v. Yurch, 229 Conn. 516, 518 n. 2 (1994) (Petition For Writ of Certiorari at 3a) for the text of this statute.

2/ See State v. Yurch, 229 Conn. 516, 517 n. 1 (1994) (Petition For Writ of Certiorari at 2a) for the text of this statute.

petitioner argued that the requirements of the regulatory licensing statute which he was convicted of violating should be construed in a manner such that the petitioner's conduct did not violate these requirements. In opposition to these motions, the respondent argued that the petitioner failed to make or preserve this statutory construction claim for appeal in the trial court, and that he had not presented it in a proper manner for appellate review. Secondly, the respondent argued that the record is not adequate to allow review of this claim. Finally, the respondent argued that the petitioner's statutory construction claim is without merit. See State's Objection to Defendant's Motions For Reconsideration and Reargument. These motions were denied without opinion.

The petitioner's appeal of his conviction was based solely upon a challenge to the trial court's "no adverse inference" instructions. The petitioner did not raise or obtain a ruling on his statutory construction claim at trial. He did not request a jury instruction or object to the failure to give an instruction on this claim. Indeed, the petitioner presented no evidence and no theory of defense to the jury. State v. Yurch, 229 Conn. at 519.

The petitioner did not raise his statutory construction claim by way of any post trial motion, or in his brief or reply brief filed in the Appellate Court.

After oral argument had been scheduled in the Appellate Court, the petitioner filed a motion seeking

to amend his statement of issues and to brief this claim. The sole basis on which the defendant relied was invocation of the plain error rule, Connecticut Practice Book Section 4185.[3/] See Motion for Permission to Amend dated April 22, 1993 at 2. The petitioner made no claim that the federal constitution entitled him to review of this claim. The Appellate Court properly denied this motion.

The petitioner did not seek review, upon certification or otherwise, by the Connecticut Supreme Court of the Appellate Court's denial of this motion. The petitioner did not present his statutory construction claim as alternate grounds for affirmance in the certified appeal before the Connecticut Supreme Court, as required by Connecticut Practice Book Section 4140, in order to obtain review of this claim.[4/]

3/ "**[Conn. Practice Book] Sec. 4185 Errors Considered.** The court on appeal shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interest of justice notice plain error not brought to the attention of the trial court..."

4/ Practice Book Section 4140 provides, in relevant part, "(a) Upon the granting of certification, the appellee may present for review alternative grounds upon which the judgment may be affirmed provided those grounds were raised and briefed in the appellate court ... If such alternative grounds for affirmation ... were not raised in the appellate court, the party seeking to raise them in the supreme court must move for special permission to do so prior to the filing of that

(footnote cont'd)

Nevertheless, the petitioner raised his statutory construction claim in his brief before the Connecticut Supreme Court. See Appellee's brief at 8-15. In doing so, the petitioner relied exclusively upon a claim of plain error. He made no claim that the federal constitution entitled him to review of his unpreserved statutory construction claim. The respondent argued that the Connecticut Supreme Court should not consider this claim because the petitioner had failed to raise or preserve it for appeal in the trial court, and because the record was not adequate to allow review of this claim. See Appellant's Reply Brief at 10.

The petitioner made no attempt to present this claim during oral argument before the Connecticut Supreme Court. The Connecticut Supreme Court's opinion rested solely upon the certified issues presented in the case, and did not address the petitioner's statutory construction claim. That court then denied the petitioner's Motions for Reargument and Reconsideration. The Connecticut Supreme Court further denied the petitioner's Motion for Stay of Execution of his sentence.

(footnote cont'd from previous page)

> party's brief. Such permission will be granted only in exceptional cases where the interests of justice so require ... (c) Any party desiring to present alternative grounds for affirmance ... shall file a statement thereof within fourteen days from the issuance of notice of certification."

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

I. THE PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

The petitioner claims that the Connecticut Supreme Court's failure to decide his statutory construction claim violated the petitioner's due process rights under the Fourteenth Amendment.

The petitioner's claim is that the Due Process Clause entitles him to appellate review in the state courts of a non-constitutional claim involving only issues of state law, which he did not present or preserve for appellate review in the trial court, and which he did not present properly for appellate review. This claim raises no substantial federal question.

The petitioner has not claimed that the statute which he was convicted of violating is unconstitutional. He has not claimed that resolution of his statutory construction claim involves interpretation or application of any federal law. He claims only that the underlying statute should be construed so that it does not apply to his conduct. Thus, the petitioner's statutory construction claim is non-constitutional, and one purely of state law. The Connecticut Supreme Court has consistently held that it is not bound to review on appeal unpreserved, non-constitutional claims. State v. Kulmac, 230 Conn. 43, 74, 644 A.2d 887 (1994).

Moreover, the petitioner did not claim before the Connecticut Supreme Court that the Due Process Clause entitles him to appellate review of his unpreserved statutory construction claim. He did not claim that his statutory construction argument was entitled to review under State v. Golding, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), which allows for appellate review of unpreserved claims involving clear violation of fundamental constitutional rights in limited circumstances. His claim for appellate review of his statutory construction claim was based solely upon the plain error rule under Connecticut Practice Book Section 4185. See Appellee's Brief at 8-15. Likewise, the petitioner's Motions for Reconsideration and Reargument were based upon his claim that "plain error and the interests of justice" required review. See Motion for Reconsideration at 3.

Thus, the petitioner never presented a federal question in the state court proceedings. In order to invoke the jurisdiction of this Court, it is essential that the federal question be raised, presented, and pursued in a timely and proper manner at the appropriate points in the state court proceedings. Hill v. California, 401 U.S. 797, 805 (1971). Here, the purported federal claim was neither raised in, nor considered and resolved by the state courts.

Even had the petitioner claimed, contrary to the facts, that he did raise the purported federal issue on his Motions for Reconsideration and Reargument, this

Court should not assert jurisdiction. See Exxon Corp. v Eagerton, 462 U.S. 176, 181 n.3 (1983) (where the general practice of the state's appellate courts was not to consider issues raised for the first time on appeal, jurisdiction was lacking over a federal claim raised for the first time on appeal); Bailey v. Anderson, 326 U.S. 206-07 (1945) (where a federal question is initially raised in the highest state court, and the record does not show that the state court has passed upon any constitutional question not raised or passed upon in the proceedings below, the jurisdiction of the Supreme Court cannot attach); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945) (raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the federal question.) Clearly then, the Connecticut Supreme Court's failure to consider an issue of state law raised for the first time on appeal cannot raise a substantial federal question.

In order to invoke the jurisdiction of this Court, the federal question must be more than a formal claim. It must not be so absolutely devoid of merit as to be frivolous. Zucht v. King, 260 U.S. 174 (1922); Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390 (1952). The defendant's claim fails to present even a colorable argument to invoke jurisdiction of the United States Supreme Court.

II. IMPORTANT QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The respondent disputes the petitioner's entire legal analysis of the underlying statute, including his claim that this statute "does not make it unlawful for a contractor who has made application for renewal of his certificate of registration within a month or exactly one month after the expiration date to continue to offer to make or to make home improvements." Petition For Writ of Certiorari at 6.

However, even if this Court accepts the petitioner's invitation to construe the Connecticut statute, the petitioner cannot show that the Connecticut Supreme Court violated his due process rights without requiring this Court to make findings of fact based upon a review of the evidence presented in the trial court. The petitioner's statutory construction claim is premised upon his assumption of the existence of certain facts regarding the petitioner's application for renewal of his certificate of registration, including that he applied for renewal of his certificate within a certain time period, which the evidence does not support and on which the defendant requested no jury instructions.

For example, the petitioner argues that his registration did not expire more than one month before his application for renewal was made. However, the record shows that the petitioner's registration expired May 1, 1990 and his renewal application was received by the Department of Consumer Protection on June 1, 1990.

This application was legally insufficient. The required fee, as stated on the face of the renewal application, was $160, plus a $20 late fee pursuant to Conn. Gen. Stat. § 20-427(f). The petitioner submitted $120 with his renewal application. The Commissioner did not act upon this application because it was incomplete, and sent the petitioner a letter on June 8, 1990 informing him that his renewal had not been issued. (T. 3-25-92 [direct examination of Martinchek] pp. 16-19; 24-26].

This Court should deny the Petition because of the necessity to make findings of fact. "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Furthermore, because the petitioner offered no evidence at trial to support a theory of defense based upon his statutory construction argument, and requested no jury instructions on this defense, the record is not adequate to allow review of the defendant's claim by the Connecticut Supreme Court or by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

STEPHEN R. PARK*
Assistant Attorney General
Special Assistant
State's Attorney
110 Sherman Street
Hartford, CT 06105-2294
Tel. (203) 566-5374

* Counsel of Record
for Respondent

October, 1994